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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 229 and 697

[Docket No. 141002823-4999-02]

RIN 0648-BE57

Taking of Marine Mammals Incidental to Commercial Fishing Operations
and Atlantic Coastal Fisheries Cooperative Management Act
Provisions; American Lobster Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic
and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to amend the regulations implementing the Atlantic Large Whale Take Reduction Plan to modify the start date of the Massachusetts Restricted Area to begin on February 1, 2015, and to expand the Massachusetts Restricted Area by 912 square miles. In addition, this rule will revise the Federal lobster regulations to be consistent with the revised start date of the Massachusetts Restricted Area. Recent Federal lobster regulations closed the Outer Cape Lobster Management Area to lobster trap fishing from January 15 through March 15, which is consistent

with the lobster trap haul-out period in the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for American Lobster. This rule would adjust the Outer Cape Lobster Management Area closure dates to February 1 through March 31.

DATES: Effective [insert date of publication in the Federal Register].

ADDRESSES: Copies of the supporting documents for this action, as well as the Atlantic Large Whale Take Reduction Team meeting summaries and supporting documents, may be obtained from the Plan website

(<http://www.greateratlantic.fisheries.noaa.gov/protected/whaletrap/index.html>) or by writing to Kate Swails, NMFS, Greater Atlantic Regional Fisheries Office, Protected Resources Division, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Kate Swails, NMFS Greater Atlantic Regional Fisheries, 978-282-8481, Kate.Swails@noaa.gov; or, Kristy Long, NMFS Office of Protected Resources, 206-526-4792, Kristy.Long@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

This final rule combines two regulatory modifications that are authorized under different statutes. Specifically, this action

amends the regulations implementing: (1) the Atlantic Large Whale Plan (Plan) regulations found at 50 CFR part 229 under the authority of the MMPA; and (2) the Federal American lobster Fishery Management Plan regulations found at 50 CFR part 697 under the authority of the Atlantic Coastal Fisheries Cooperative Management Act.

NMFS published a final rule implementing an amendment to the Plan on June 27, 2014 (79 FR 36586) to address large whale entanglement risks associated with vertical line (or buoy lines) from commercial trap/pot fisheries. That amendment included gear modifications, gear setting requirements, a seasonal closure (Massachusetts Restricted Area) and gear marking for both the trap/pot and the gillnet fisheries. The Massachusetts Restricted Area is a seasonal closure effective January 1 through April 30 for all trap/pot fisheries. Trap/pot fisheries account for the largest number of vertical lines in the water column.

In September 2010, in consultation with the Atlantic Large Whale Take Reduction Team (Team), NMFS developed protocols for considering modifications or exemptions to the regulations implementing the Plan. Following these protocols, on August 18, 2014, the Massachusetts Division of Marine Fisheries (DMF) submitted a proposal to modify the Massachusetts Restricted Area and exempt several areas from the gear setting requirements to address safety

and economic concerns raised by Massachusetts fishermen.

Review of Massachusetts Restricted Area

The proposal submitted by DMF contains two components:

- (1) Modify the Massachusetts Restricted Area (closure), which begins on January 1, 2015 by:
 - o Modifying the timing and size of the closure.
 - o Establishing gear stowage areas during a portion of the closure.
- (2) Establish several exemption areas to the current minimum number of traps per trawl requirement, which take effect June 1, 2015.
 - o Exemption areas would include portions of Southern New England waters (Buzzards Bay, Vineyard Sound, and Nantucket Sound) as well as state waters north and east of Cape Cod.

Given the importance of addressing the closure before it begins on January 1, 2015, and the time needed to complete the analysis of the entire suite of requests contained in the entire DMF proposal, NMFS decided to address the modifications to the closure and the exemption of the minimum number of traps per trawl requirements separately.

Changes to the Plan

This action modifies the start date of the closure to begin on February 1, 2015 and expand the area by 912 square miles. This action responds to comments to improve the past action while balancing risk reduction considerations. Specifically, the action decreases the number of affected vessels and results in reductions in compliance costs while maintaining the same entanglement risk reduction as provided in the June 2014 amendment to the Plan.

At its October 1, 2014 meeting, the Team discussed the requested modifications to the closure, as well as the creation of the trap/pot storage areas. The discussion included a review of the merits and analysis of the DMF proposal utilizing NMFS's co-occurrence model. The model incorporates information on geographic and temporal variations in fishing effort and the distribution of fishing line, as well as whale sightings per unit of survey effort, and identifies areas and times at which whales and commercial fishing gear are likely to co-occur. The model's final product is a set of indicators that provide information on factors that contribute to the risk of entanglement at various locations and at different points in time. These indicators, in particular the number of vertical lines in an area and the area's co-occurrence score, assumed to be related to the relative entanglement risk in different locations. They also provide a basis for comparing the impact of alternative management

measures on the potential for entanglements to occur.

NMFS compared the impacts of the current and new closure areas for conservation benefit using its co-occurrence model and economic analysis. The methods and data sources used in this analysis are consistent with those applied in the Final Environmental Impact Statement (FEIS) for the 2014 Plan amendments referred to above. The changes to the closure would allow approximately 125 vessels to continue to fish during a lucrative time of year for the fishing industry and would require a slightly greater number of vessels to suspend activity from February through April. This is because the new closure area is larger than the current closure area, an increase of 912 square miles. On average, the new closure area offers a similar reduction in co-occurrence to that of the current closure (38.2 %) while providing less of an economic burden. Therefore, this action minimizes potential economic impacts without increasing risk to large whales.

At the conclusion of the October 1, 2014, meeting, the Team, by consensus, recommended that we modify the Massachusetts Restricted Area as proposed by DMF. However, the Team recommended that NMFS not act on DMF's proposed trap/pot storage areas. The remainder of DMF's proposal will be analyzed and discussed with the Team during its January 2015 meeting. The Team will provide NMFS

a recommendation at that time on whether to move forward with the remaining components of the DMF proposal.

Changes to American Lobster Regulations

On April 7, 2014, NMFS published a final rule (79 FR 19015) that implemented the Outer Cape Area lobster haul-out period. In that rule, NMFS acknowledged in the preamble that it might need to adjust the closure dates if Massachusetts ultimately requested a different time period (See Response to Comment 22, 78 FR 35217, June 12, 2013). Now that Massachusetts has done so, the original Outer Cape Area lobster closure dates would become outdated and may create unintended impacts to Federal lobster fishers. For example, if NMFS did not adjust the January 15 start date, Federal lobster fishers would have to remove their traps from the Outer Cape Area two weeks earlier than the February 1 start date that exists in the Massachusetts regulations and the Plan. Therefore, in this rule, NMFS changes the start date of the Outer Cape Lobster Management Area closure dates from January 15 to February 1. Further, NMFS adjusts the end of the Outer Cape Area haul-out period by two weeks from March 15 to March 31, to continue with a full two-month haul-out period as dictated by the Commission. NMFS considered extending the haul-out period to April 30, to be consistent with the Plan. However, the southwestern portion of the Outer Cape Area is not included in the Plan's revised

closure area, and would be closed for an additional month longer than the Commission's two-month haul-out period. Accordingly, NMFS will simply shift the Outer Cape Area haul-out period dates ahead by two weeks. After March 31, lobster trap fishermen in the Massachusetts Restricted Area will be held to the more restrictive Plan dates through April 30.

Comments and Responses

NMFS published the proposed rule amending the Plan in the Federal Register on November 6, 2014 (79 FR 65918). Upon its publication, NMFS issued a press email announcing the rule; posted the proposed rule on the Plan website; and notified affected fishermen and interested parties via several NMFS email distribution outlets. The publication of the proposed rule was followed by a 15-day public comment period, which ended on November 21, 2014. NMFS received fourteen substantive comments via electronic submission. All comments received were thoroughly reviewed by NMFS. Comments were in full support of the action or in partial support of the action with some concerns. The comments addressed several topics, including adequacy of the model, need for enforcement of the closure, and confusion over changes to the Massachusetts Restricted Area closure vs the Outer Cape Lobster Management Area closure. The comments received are summarized below, followed by NMFS's

responses.

Adequacy of Co-occurrence Model

Comment 1: Several commenters questioned the adequacy of the co-occurrence model and the data used to develop the model. They stated that the data are several years old, may be flawed, and may not accurately reflect the current fishing effort in the area.

Response: We believe the information in the model is accurate but does have some limitations. We previously provided model documentation describing the fishing effort data upon which the model relies, including a detailed discussion of the models limitations. We plan on updating the model with more current information as time allows for future rulemakings. The data used for this action are the same as the data used for the June 27, 2014 final rule implementing the most recent amendment to the Plan(79 FR 36586). This allows us to conduct a comparison between the effects of the new closure area verses the previously approved closure area.

Enforcement

Comment 2: One commenter stated that NMFS needs to do a better job enforcing/supporting the Endangered Species Act and not just rely on the Marine Mammal Protection Act measures to reduce entanglements with lobster gear.

Response: Although NMFS agrees that law enforcement is a critically important component to the success of its conservation measures, NMFS disagrees with the claim that it relies solely on the conservation measures implemented through the Marine Mammal Protection Act. NMFS has allocated funding for enforcement of take reduction plan regulations on an annual basis through its Endangered Species Act-based Joint Enforcement Agreements (JEA) with its state partners (Maine, New Hampshire, Massachusetts, Rhode Island, and New Jersey). In addition, over the past two years NMFS has also provided additional funding set aside for law enforcement to investigate potential "hot spots." Hot spots are those areas identified as areas of concern and in need of additional enforcement.

Comment 3: One commenter stated that there is a need for strict enforcement of the February 1 date for gear removal. The commenter stated that the Plan's requirements require robust monitoring and enforcement efforts.

Response: We agree that the efficacy of the Plan depends on strong monitoring and enforcement of the regulations. We work closely with the U.S. Coast Guard, NOAA Office of Law Enforcement and state partners through Joint Enforcement Agreements to enforce the regulations and we will continue to do so. We will also conduct numerous outreach efforts to ensure the industry knows of the

impending closure and the requirements to remove gear.

Changes to Massachusetts Restricted Area vs Outer Cape Lobster
Management Area

Comment 4: One commenter voiced confusion over the conflicting dates of the modified Massachusetts Restricted Area closure and the adjustment of the gear haul-out closure period for the Outer Cape Lobster Management Area.

Response: The February 1 - March 31 gear haul-out period in NMFS's lobster regulations does not conflict with the February 1 - April 30 modified Massachusetts Restricted Area closure period in NMFS's large whale Plan regulations. In short, the two closures pertain to two different, albeit mostly overlapping areas, which are being closed for two separate reasons. The different closure dates maintain the distinction in their purpose, i.e., the February 1 - March 31 closure benefits the lobster resource, while the February 1 - April 30 closure benefits whales. Where the lobster and whale areas overlap, fishers will have to abide by both closures, including the whale closure during the month of April.

The final rule will adjust the Massachusetts Restricted Area closure area, consistent with the revised timing and area proposed by the Commonwealth of Massachusetts. The revised closure area is expanded by 912 square miles and includes most, but not all, of the

Outer Cape Area. Under the June 2014 large whale Plan final rule, only the northern portion of the Outer Cape Area remained within the Massachusetts Restricted Area closure area. Additionally, this action revises the Massachusetts Restricted Area closure period to more effectively align with the co-occurrence model, by shifting the closure period from January 1 - April 30, to February 1 - April 30. Accordingly, we have also shifted the two-month Outer Cape Area gear haul-out period in the Federal lobster regulations to fall within the three-month Massachusetts Restricted Area closure period.

Under the Federal lobster regulations, the Outer Cape Area is subject to a gear haul-out period, which requires all Outer Cape Area lobster trap fishers to remove their trap gear from this Area from January 15 - March 15 each year. These dates were adopted in the lobster regulations because they match the dates adopted for this purpose in the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for Lobster and are consistent with those dates currently in place by the Commonwealth of Massachusetts. The intent of the haul-out period is to facilitate the enforcement of trap limits and is timed when lobster trap fishing activity in the area is at a relatively low level.

Before we adopted the gear haul-out period into the Federal lobster regulations, as recommended by the Commission, the

Commonwealth of Massachusetts was considering shifting the two-month Outer Cape Area haul-out period in state waters from the original January 15 - March 15 period, to February 1- March 31, to better address the needs of the Outer Cape fishery. Consequently, in the proposed rule for this measure, NMFS considered and sought comment on similarly shifting the haul-out dates should Massachusetts ultimately do so (see response to Comment 22, 78 FR 35217). By the time the final rule implementing the lobster management action published in the Federal Register (April 7, 2014, 79 FR 19015), Massachusetts had not changed the gear haul-out period, so NMFS implemented in that rule the dates that were in place at the time in the Massachusetts regulations (January 15-March 15), to be consistent with the Commonwealth and the Commission's Plan. At the time, the start and end dates of the two-month gear haul-out period fell within the initial four-month Massachusetts Restricted Area closure dates under consideration in the Plan proposed rule (January 1-April 30). So, the small portion of the Outer Cape Area that overlapped into the initial Massachusetts Restricted Area closure area would continue to be closed to lobster traps after the haul-out period ended, under the Plan, because the haul-out period would end before the Plan closure period ends.

Since the lobster gear haul-out regulations were implemented,

the Commonwealth has come forward with a comprehensive revision to the Massachusetts Restricted Area closure area, which now includes all of the Outer Cape Area, with the exception of a small portion located west of 70 degrees north longitude, in Nantucket Sound. The Massachusetts proposal also shifts the closure dates for the Massachusetts Restricted Area closure to begin on February 1. Therefore, we have adjusted the lobster regulations governing the Outer Cape Area gear haul-out period, so that Outer Cape lobster trap fishers operating inside the affected area would not be impacted by the closure two weeks earlier due to the fact that the Outer Cape Area gear haul-out period is currently set for a January 15 closure. Additionally, we did not extend the full three-month closure date to the entire Outer Cape Area, because we did not want to unnecessarily impact trap fishers operating in the western portion of the Outer Cape Area, which is outside of the modified Massachusetts Restricted Area closure area.

Upon receipt of the Massachusetts proposal, NMFS assessed the impacts associated with the revised closure area, but did not formally assess the potential impacts in the portion of the Outer Cape Area that falls outside of the revised closure area (that area west of 70 degrees north longitude). Additionally, because the initial assessment on the Outer Cape Area gear haul out-period

included only a variable two-month period, NMFS did not have the information needed to justify aligning the entire Outer Cape Area gear haul-out period with the three-month closure period for the vertical line rule, particularly because it could potentially impact those fishers operating in April in the portion of the Outer Cape Area that falls outside the vertical line closure area. Regardless, this final rule revises the Outer Cape Area lobster trap gear haul-out period to fall within the Massachusetts Restricted Area closure period. Therefore, when the gear haul-out period ends on March 15, all traps/pots (including lobster traps) will remain prohibited in the Massachusetts Restricted area through April 30, under the Plan. Shifting the dates, but maintaining the length of the two-month gear haul-out period will prevent those fishermen fishing in the Outer Cape Area west of 70 degrees north longitude from being subject to a three-month closure, when not required under the Plan.

NEPA/ESA Analysis

Comment 5: One commenter was concerned with the analysis the Agency conducted for this action under the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) saying that it is not legally sufficient. The commenter stressed that future changes to the Plan must be evaluated using a full and proper NEPA analysis and reinitiation of the ESA Section 7 consultation.

Response: We feel the analysis we conducted for this action is sufficient. After considering the proposed action, new information and new circumstances, we determined that it is not necessary to supplement the 2014 Plan Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) because: (1) the shift of the closure in time/area and its impacts are not substantially different from what was originally considered and analyzed; and (2) no new information or circumstances exist that are significantly different from when the ROD was signed on June 20, 2014. The FEIS and ROD remain valid to support this action. NMFS has also determined that it is not necessary to supplement the American Lobster FMP 2014 FEIS and ROD because: (1) there are no additional impacts from shifting the closure period by two weeks; and (2) no new information or circumstances exist that are significantly different from when the ROD was signed on April 7, 2014. The FEIS and ROD remain valid to support this action. Also, NMFS believes that the changes to the rule amending the Plan do not constitute a modification to the operation of the Plan that would cause an effect to ESA-listed species or critical habitat not considered in the previous consultations. Therefore, the proposed measures do not meet the triggers for reinitiation of consultation. Should activities under this action change or new information become available that changes the basis

for this determination, then consultation should be reinitiated.

Lack of Management Measures

Comment 6: One commenter was concerned that there seems to be a lack of policies for addressing climate change through adaptive management when protecting right whales. The commenter suggests instead of shifting the date of the closure to begin on February 1 the Agency should manage the area using Dynamic Area Management procedures instead of opening the whole area to fishing for the whole month of January.

Response: As stated in response to similar comments in the June 27, 2014 final rule, we acknowledge that it is challenging to manage resources in the face of changing environmental conditions. The Plan is an evolving Plan and should NMFS discover that conservation measures are no longer appropriate as a result of climate change and shifting baselines, we have the ability to make changes to the measures.

Comment 7: One commenter supported the closure but wanted the measures to extend to the gillnet fishery.

Response: As we have stated in response to comments on the June 27, 2014 final rule, including gillnets in the recent management measures was analyzed in the FEIS and rejected (See Chapter 3, Appendix 3-A of the May 2014 FEIS). The co-occurrence model shows

that 99% of the vertical lines coastwide are from lobster trap/pot and other trap/pot fisheries. For this reason, we chose to focus this closure (and recent management measures) on trap/pot gear only.

Classification

The Office of Management and Budget (OMB) has determined that this action is not significant for the purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this final rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published with the proposed rule and is not repeated here. No comments were received regarding the economic impact of this final rule. As a result, a final regulatory flexibility analysis is not required and one was not prepared.

The Assistant Administrator finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness. The contents of this action serve to remove existing commercial fishing restrictions and to prevent negative economic impacts from otherwise occurring as the Massachusetts Restricted Area would have been effective beginning January 1, 2014. Delaying the effectiveness of

this rule is contrary to the public interest, because any delay will prevent the additional fishery activities implemented by this rule, thereby reducing revenues, and providing no additional meaningful benefit to large whales. Accordingly, the 30-day delay in effectiveness is both unnecessary and contrary to the public interest, and as such, this rule will become effective immediately.

List of Subjects

50 CFR Part 229

Administrative practice and procedure, Confidential business information, Fisheries, Marine mammals, Reporting and recordkeeping requirements.

50 CFR Part 697

Fisheries, fishing.

Dated: December 8, 2014

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR parts 229 and 697 are amended to read as follows:

PART 229--AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

1. The authority citation for 50 CFR part 229 continues to read as follows:

Authority: 16 U.S.C. 1361 et seq.; § 229.32(f) also issued under 16 U.S.C. 1531 et seq.

2. In § 229.32, paragraph (c) (3) is revised to read as follows:
§ 229.32 Atlantic large whale take reduction plan regulations.

* * * * *

(c) * * *

(3) Massachusetts Restricted Area--(i) Area. The Massachusetts restricted area is bounded by the following points connected by straight lines in the order listed, and bounded on the west by the shoreline of Cape Cod, Massachusetts.

Point	N. Lat.	W. Long.
MRA1	42°12'	70°44'
MRA2	42°12'	70°30'
MRA3	42°30'	70°30'
MRA4	42°30'	69°45'

MRA5	41°56.5'	69°45'
MRA6	41°21.5'	69°16'
MRA7	41°15.3'	69°57.9'
MRA8	41°20.3'	70°00'
MRA9	41°40.2'	70°00'

(ii) Closure. From February 1 to April 30, it is prohibited to fish with, set, or possess trap/pot gear in this area unless stowed in accordance with § 229.2.

(iii) Area-specific gear or vessel requirements. From May 1 through January 31, no person or vessel may fish with or possess trap/pot gear in the Massachusetts Restricted Area unless that gear complies with the gear marking requirements specified in paragraph (b) of this section, the universal trap/pot gear requirements specified in paragraph (c) (1) of this section, and the area-specific requirements listed in (c) (2) of this section, or unless the gear is stowed as specified in § 229.2.

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PART 697 - ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

3. The authority citation for part 697 continues to read as follows:

Authority: 16 U.S.C. 5101 et seq.

4. In § 697.7, revise paragraph (c) (1) (xxx) introductory text to read as follows:

§ 697.7 Prohibitions.

* * * * *

(c) ***

(1) ***

(xxx) Outer Cape Area seasonal closure. The Federal waters of the Outer Cape Area shall be closed to lobster fishing with traps by Federal lobster permit holders from February 1 through March 31.

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[FR Doc. 2014-29195 Filed 12/11/2014 at 8:45 am; Publication Date: 12/12/2014]